

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Telephone Number Portability)

) CC Docket No. 95-116
) RM 8535
)

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OPPOSITION

BellSouth Corporation and BellSouth Telecommunications, Inc., by counsel, submit this opposition to certain petitions for reconsideration filed in this proceeding.¹

I. THE FCC'S CURRENTLY AVAILABLE NUMBER PORTABILITY COST RECOVERY GUIDELINES ARE NOT RETROACTIVE

The Commission was without authority to adopt cost recovery guidelines for remote call forwarding ("RCF") and flexible direct inward dialing ("DID").² MCI is incorrect when it states that the 1996 Act³ requires local exchange carriers ("LECs") to provide interim number portability; or that the Act provides that the costs for interim number portability must be borne by

¹ Public Notice, *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, FCC Report No. 2151, Subject: Telephone Number Portability (CC Docket No. 95-116) 61 Fed. Reg. 48154 (Sep. 12, 1996).

² *Telephone Number Portability*, FCC 96-286, CC Docket No. 95-116, Bell Atlantic's Petition for Clarification and Partial Reconsideration (Aug. 26, 1996) at 14; BellSouth Corporation, et al., Petition for Reconsideration or Clarification (Aug. 26, 1996), pp. 3-7, SBC Communications Inc. Petition for Reconsideration (Aug. 26, 1996), pp. 3-6.

³ Pub. L. 104-104, 110 Stat. 56, enacted Feb. 8, 1996.

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all telecommunications carriers on a competitively-neutral basis.⁴ As used in the 1996 Act, interim LNP is a section 271 checklist item, applicable only to Bell operating companies (“BOCs”), not a federal mandate to all LECs.⁵ Interim LNP is already established.⁶ Long-term, or final, number portability (“LNP”), which is what is required of all LECs by the 1996 Act when technically feasible, is not.

The Commission has no legal authority to impose rules on the States governing established intrastate functionalities for which rates have been established through state proceedings, voluntary negotiations, or both.⁷ Assuming, *arguendo*, that it did, it has no authority to apply such rules retroactively as one petitioner contends.⁸ To the extent the Commission based its jurisdiction to establish its interim LNP cost recovery guidelines on anything other than the 1996 Act,⁹ it had no authority to override section 2(b) of the Communications Act of 1934¹⁰ or to depart from cost-causative pricing principles. To the extent the Commission based its jurisdiction

⁴ MCI Telecommunications Corporation, et al., Petition for Clarification at 1 (1996 Act requires LECs to provide interim LNP through RCF and DID), 2 (Act provides that costs of interim LNP must be borne on a competitively neutral basis).

⁵ SBC Petition for Reconsideration at 3-6.

⁶ Bell Atlantic’s Petition for Clarification and Partial Reconsideration at 12.

⁷ See *Telephone Number Portability*, FCC 96-286, CC Docket No. 95-116, New York Department of Public Service, Comments at 2 (Aug. 15, 1996) (general authority to allocate costs among carriers does not extend to the carrier’s recovery of the intrastate portion of the number portability costs from their customers; to the extent that such costs are recovered through rates for intrastate service, such recovery is a matter subject to state jurisdiction); Illinois Commerce Commission Comments at 6 (Aug. 14, 1996) (the 1996 Act did not remove or reduce state jurisdiction over intrastate rate design).

⁸ American Communications Services, Inc. (“ACSI”), Petition for Partial Reconsideration at 5-7.

⁹ *Telephone Number Portability*, FCC 96-286, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking (“*Number Portability Order*”), ¶ 112 (Jul. 2, 1996).

¹⁰ 47 U.S.C. § 152(b).

to promulgate interim number portability rules on the 1996 Act, neither that Act, nor recognized principles of administrative law, allow for retroactive application of the Commission's guidelines.

ACSI cites no legal authority in support of its contention that new entrants who have entered into voluntary negotiated agreements with incumbent LECs should receive reimbursement of any difference between amounts paid for RCF and DID pursuant to such agreements and amounts paid according to rates set by States following the *Number Portability Order* retroactive to February 8, 1996.¹¹ The 1996 Act expressly states:

(a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATION

(1) VOLUNTARY NEGOTIATIONS. - Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting communications carrier or carriers *without regard to the standards set forth in subsections (b) and (c) of section 251*. (emphasis added).¹²

As the Conference Report on S. 652 explains:

Interim number portability may require that calls to or from the subscriber be routed through the local exchange carrier's switch. Some method of call forwarding or similar arrangement could be used to satisfy this requirement. The method of providing interim number portability and the amount of compensation, if any, for providing such services is subject to the negotiated interconnection agreement, pursuant to section 251.¹³

Thus, Congress expressly contemplated that incumbent LECs would negotiate in good faith with new entrants for the terms and conditions of interconnection, including cost recovery for interim

¹¹ ACSI Petition for Partial Reconsideration at 6-7.

¹² 1996 Act, § 252(a)(1).

¹³ Conf. Rep. S. 652 at 119 (Pike & Fisher, 1996). The Conference Report expressly distinguishes between compensation for *interim* number portability, which is subject to negotiated interconnection agreements, *Id.*, and cost recovery for *final* number portability: "the cost of such [final] number portability shall be borne by all providers on a competitively neutral basis." *Id.* at 120 (emphasis added).

number portability provided through established intrastate functionalities such as RCF and DID.

There is simply no legal authority to retroactively apply rules adopted by State commissions following the *Number Portability Order* to previously negotiated agreements.

A statutory grant of legislative rulemaking power will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.¹⁴ Congress has not, in the 1996 Act, conveyed such retroactive rulemaking authority on the Commission with respect to either interim or final number portability. As shown above, the Conference Report on S. 652 makes clear that Congress envisioned that interim number portability, in the form of call forwarding arrangements routed through the incumbent LEC's network, was to be made available on request on mutually agreeable terms and conditions obtained through voluntary negotiations toward binding interconnection agreements.¹⁵ Final number portability, on the other hand, was to be made available when the Commission determined that final number portability was technically feasible, and the cost of final number portability was to be borne by all providers on a competitively neutral basis.¹⁶

Thus, final number portability, as envisioned by Congress, is inherently a forward looking, prospective requirement because, at the date of legislative enactment, it was not yet technically feasible. The costs of "establishing" final number portability are to be borne by all carriers on a competitively neutral basis.¹⁷ The costs of providing already established interim number

¹⁴ Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).

¹⁵ *supra* n. 11.

¹⁶ *Id.*

¹⁷ 1996 Act, § 251(e)(2).

portability, on the other hand, are the appropriate subject of voluntary negotiations and agreements reached between carriers.¹⁸ Retroactive application of rates to interim arrangements that have already been negotiated would improperly take away or impair vested rights acquired under existing law, create new obligations, impose new duties and attach new disabilities in respect to transactions or considerations already past.¹⁹ They would also run afoul of state statutes prohibiting retroactive ratemaking.²⁰ Given the complete absence of any express Congressional conferral of retroactive legislative rulemaking authority, any rates set according to the Commission's currently available cost recovery guidelines can only have prospective effect.

II. THE COMMISSION'S LONG-TERM DATABASE NUMBER PORTABILITY IMPLEMENTATION SCHEDULE SHOULD ONLY BE MODIFIED TO ALLOW LEC'S TO FULLY IMPLEMENT THE TOP 100 METROPOLITAN STATISTICAL AREAS

The Commission established an aggressive and ambitious implementation schedule for long-term database number portability ("LNP") in its Number Portability Order.²¹ The implementation schedule begins with the largest MSA in each of the seven BOC traditional operating territories, and each quarter adds additional MSAs until, within a period of 15 months, the top 100 MSAs are implemented.²² Following this, LECs must provide LNP within 6 months of a bona fide request from carriers anywhere in their service territory.²³

¹⁸ *supra* n.11.

¹⁹ Health Insurance Association v. Shalala, 23 F.3d 412, 422 (D.C. Cir. 1993) (disallowing retroactive application of regulations).

²⁰ See, e.g., Section 366.06(2), Florida Statutes.

²¹ *Number Portability Order* at B-5, B10-11, to be codified at 47 C.F.R. §52.3(b), App. A to Part 52.

²² *Id.*

²³ *Id.* at B-5, to be codified at 47 C.F.R. §52.3(c).

BellSouth has demonstrated why this schedule may have to be modified by permitting MSAs with populations exceeding 1 million to be implemented in 6, rather than 3, months.²⁴ A number of carriers who either currently operate or seek entry in areas not within the 100 MSAs understandably seek modification of the Commission's LNP implementation schedule to accelerate deployment in less densely populated markets.²⁵ These carriers cite regional imbalances in population densities reflected in the implementation schedule,²⁶ "prejudice" against smaller markets reflected in the schedule,²⁷ and inevitably, accuse LECs of "footdragging" before LNP is even technically feasible.²⁸

The implementation schedule is tight enough as it is, and was developed by the Commission based upon vendor representations of switch software availability.²⁹ As a general matter, BellSouth recommends that industry participants accept the Commission's prioritizing of MSAs, and recognize that adding additional deployment responsibilities outside these areas will only jeopardize meeting that schedule. No new central offices should be added to the Commission's existing schedule. All proposals, whether they add additional MSAs, accelerate deployment of smaller MSAs within the top 100, or accelerate the date of initiating bona fide requests, will simply result in adding additional burdens to an already tight schedule, and make a mockery of the Commission's carefully conceived phased deployment. If the Commission alters

²⁴ BellSouth Petition for Reconsideration or Clarification at 10 - 15.

²⁵ See ACSI Petition for Reconsideration at 7-12; KMC Telecom, Inc. Petition for Reconsideration; Nextlink Communications L.L.C. Petition for Reconsideration.

²⁶ Nextlink Petition for Reconsideration at 5.

²⁷ ACSI Petition for Reconsideration at 7.

²⁸ KMC Petition for Reconsideration at 11.

²⁹ *Number Portability Order* at ¶¶ 77, 78.

its implementation schedule accordingly, a corresponding number of central offices within the original implementation schedule should be removed in order to offset the deleterious impacts that adding new offices will have on the original implementation schedule. Further, failure to timely implement any MSA not on the Commission's original schedule should not constitute a failure to meet a Section 271 checklist requirement.

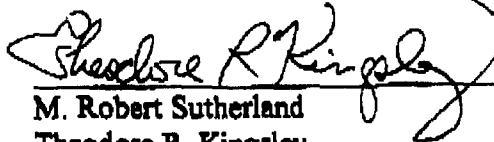
CONCLUSION

The costs of interim number portability arrangements are the proper subject of voluntarily negotiated interconnection arrangements. No rate for RCF or DID set pursuant to the Commission's cost recovery guidelines for currently available measures should be applied retroactively. The Commission should not modify its original LNP implementation schedule to increase the number of central offices that need to be implemented.

Respectfully submitted,

BELLSOUTH CORPORATION and
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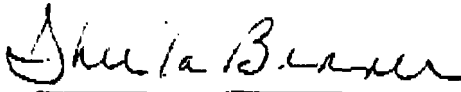
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CERTIFICATE OF SERVICE
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I hereby certify that I have this 27th September, 1996 served the following parties to this action with a copy of the foregoing OPPOSITION by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed on the attached service list.



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